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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

12 CR 934

5 SHU FENG XIA,

6 Defendant.

7 -----x

8 New York, N.Y.
9 August 12, 2015
11:41 a.m.

10 Before:

11 HON. RONNIE ABRAMS

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 REBECCA MERMELSTEIN

Assistant United States Attorney

18 RANDA DEA MAHER

19 Attorney for Defendant

20 ALSO PRESENT: VICTOR CHANG, Mandarin Interpreter

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(In open court; case called)

MS. MERMELSTEIN: Good morning, your Honor.

Rebecca Mermelstein for the government. With me is Special Agent Christopher DeGraff.

THE COURT: Good morning.

MS. MAHER: Good morning. Randa Maher for Mr. Xia.

THE COURT: Good morning, Ms. Maher. And good morning, Mr. Xia. I'll note for the record that Mr. Xia is being aided by an interpreter. If you're having any problems understanding anything please let me know, okay. And you have to answer out loud.

THE DEFENDANT: Okay.

THE COURT: So this matter is on for resentencing, United States v. Shu Feng Xia. In addition to the materials previously referenced at the original sentencing I have also reviewed the presentence investigation report which was revised and it was dated February 18, 2015 as well as defendant's sentencing memorandum of July 31.

Have the parties received each of these submissions?

MS. MERMELSTEIN: Yes, your Honor.

MS. MAHER: Yes, your Honor.

THE COURT: So Ms. Maher have you reviewed the presentence report with Mr. Xia?

MS. MAHER: I have not had a chance to review this but I understand it was reviewed previously with Mr. Xia by

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1 Mr. Dratel. It is the same one that --

2 THE COURT: It has been revised slightly.

3 MS. MAHER: I apologize for that.

4 THE COURT: So why don't we take a break and why don't
5 you just make sure that he is familiar with the entire
6 presentence report, okay.

7 MS. MAHER: Thank you, your Honor.

8 THE COURT: Because this was actually revised after
9 the sentence. So just let me know when you're ready.

10 (Pause)

11 THE COURT: Ms. Maher, just to be clear. As it notes
12 on the cover page, it indicates that the third addendum sets
13 forth revisions that have been made. So I'm not suggesting --
14 I'm going to rely on all of my previous rulings but I just want
15 to make sure you've gone over anything additional with him that
16 hasn't been addressed previously.

17 MS. MAHER: No. I believe everything was previously
18 addressed and he's aware of that.

19 THE COURT: So take the time you need but I just
20 wanted to make sure that anything that is revised in this
21 presentence report, he has reviewed, you have discussed with
22 him so to the extent you have any objections that haven't been
23 ruled on previously you have an opportunity to make them.

24 MS. MAHER: The issue was I met with him for the first
25 time yesterday was -- we didn't have a chance to go over it.

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1 THE COURT: So go ahead.

2 (Pause)

3 Other than the objections I've already ruled on, do
4 you have any additional objections to the presentence report?

5 MS. MAHER: No, your Honor.

6 THE COURT: Does the government have any additional
7 objections?

8 MS. MERMELSTEIN: No, your Honor.

9 THE COURT: The court adopts the factual findings in
10 the report. The presentence report will be made a part of the
11 record in this matter and placed under seal. If an appeal is
12 taken, counsel on appeal may have access to the sealed report
13 without further application to the court.

14 For the reasons stated in the original sentencing and
15 in light of my conclusion that the offense involved at least 25
16 to 99 documents, and that Mr. Xia is entitled to two acceptance
17 points, I find that the offense level is 15, the defendant's
18 criminal history category is I, and the guidelines range is 18
19 to 24 months in prison. And the applicable fine range is
20 \$4,000 to \$40,000. Just to be clear, do you want to be heard
21 on that at all, Ms. Maher?

22 MS. MAHER: Yes, I just want to state that Mr. Xia
23 does not have the financial resources to pay any fine
24 whatsoever.

25 THE COURT: Okay.

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1 MS. MAHER: Neither does his family. He's the primary
2 breadwinner and he's been incarcerated for ten months and about
3 two days per my count.

4 THE COURT: Thank you.

5 Just to confirm, neither party is seeking a downward
6 departure as opposed to variance; is that correct?

7 MS. MERMELSTEIN: Yes, your Honor.

8 MS. MAHER: Your Honor, at the time you sentenced him
9 originally he was sentenced to a year and a day which was a
10 departure from the 18 to 24 months. So we are seeking to have
11 him sentenced below that for the purposes that we have already
12 stated in our submissions to the court.

13 THE COURT: But just to be clear you're seeking a
14 variance under 3553(a).

15 MS. MAHER: Yes.

16 THE COURT: You're not seeking a downward departure
17 anticipated or addressed in the guidelines, as we call it, a
18 pre-Booker guideline? You're just looking for a variance,
19 correct?

20 MS. MAHER: Yes, your Honor.

21 THE COURT: So just to be clear I've considered
22 whether there's an appropriate basis for a downward departure
23 from the advisory range within the guidelines, and by that I
24 mean a pre-Booker departure. While recognizing that I have the
25 authority to depart, I do not find any grounds warranting such

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1 a departure under the guidelines.

2 But as to a variance, I'm happy to hear from the
3 parties. Would the government like to be heard with respect to
4 sentencing?

5 MS. MERMELSTEIN: Very briefly, your Honor.

6 I think the court is already aware of the government's
7 view with regard to the propriety of crafting a sentence for
8 the purpose of assisting the defendant in avoiding the
9 otherwise applicable immigration consequences. When I say
10 "propriety," I'm not in any way suggesting your Honor isn't --
11 can't do that if your Honor wants to. But the concept of
12 crafting a sentence to avoid those immigration consequences I
13 think is inappropriate in an immigration fraud case. I will
14 note that since the last time we appeared before your Honor
15 U.S. CIS, United States Citizenship and Immigration Services,
16 has hired 34 additional personnel to handle the fallout from
17 this case. And part of what that means is recalling three
18 thousand granted asylum applications on the basis of fraud to
19 take away the asylum. And those individuals, because many of
20 them were here illegally, will then be placed in deportation
21 proceedings. So people who otherwise could have stayed under
22 the radar through this fraud applied for asylum and many, many,
23 many of them will be deported. I imagine not all. Many. So
24 the government doesn't feel that this defendant should get some
25 benefit that those people will not be eligible for.

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1 In any event, recognizing that your Honor doesn't
2 share the government's view, I would say only two things with
3 regard to the defendant's request. First, I can see no reason
4 for the defendant to be given a sentence of time served, which
5 would be a slightly lower sentence than what he would have
6 received if he had been given a year and a day with good time.
7 Your Honor, in sentencing Lillian Miao, gave her eleven months
8 on this exact same request.

9 THE COURT: She was more culpable, correct?

10 MS. MERMELSTEIN: Well I think that in the
11 government's view she was. They originally sort of -- I think
12 your Honor intended to originally give them the same sentence.

13 But to the extent that the intent in this proceeding
14 is to change the defendant's originally imposed sentencing to
15 make him not an aggravated felon, I don't think there's any
16 change since the original sentencing that warrants a further
17 benefit beyond that. So I think that there is no particular
18 reason he shouldn't be given a sentence where he'll be released
19 on August 23, 2015 as he would otherwise have done.

20 And then finally I think supervised release is
21 appropriate in this case. I think that this is a defendant for
22 many years, his employment was entirely fraudulent. And it
23 would be a good idea for probation and for the court to keep an
24 eye on him in the immediate time of his release, especially as
25 he's likely to now remain in the country.

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1 THE COURT: Would you like to be heard?

2 MS. MAHER: Yes, your Honor.

3 First, I just would like to state that this is the
4 first time I'm hearing the government's opposition to the
5 sentence that we requested. I didn't receive anything in
6 writing, I don't know if anything was filed, with regard to the
7 public policy reasons and the specific reasons that are being
8 advocated against a sentence of time served.

9 I will state that we are still seeking that. Mr. Xia
10 has been incarcerated, by my count, for ten months and two
11 days. He is actually, my understanding, due to be released on
12 August 21 which is nine days from now. And we feel that for
13 the reasons we specified in our July 31 supplemental submission
14 that he -- a sentence of time served would be a fair and
15 appropriate sentence in this case as well as without a term of
16 supervised release. He was a very low level person within this
17 organization. He was less culpable unanimous Ms. Miao. The
18 government's statement now is a little confusing to me because
19 the record seems clear that it was acknowledged that she was
20 more culpable. Her guidelines were significantly higher or
21 certainly not significantly but certainly higher than Mr. Xia's
22 guidelines. She was a total offense level of 18. Her
23 guideline range was 27 to 33 months. And your Honor sentenced
24 her to 11 months. And to have Mr. Xia released ten months and
25 two days into his sentence would be proportional with what she

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1 was given.

2 While we understand that deportation is not within
3 this court's control, we would also request that the court
4 acknowledge, as it did in Ms. Miao's case, that there appears
5 no need for Mr. Xia to be deported. That was stated on the
6 record in Ms. Miao's case. And she, again, was more culpable
7 than Mr. Xia was. And Mr. Xia spent over ten months in
8 incarceration. It's clear that he did not present a danger to
9 society before and he doesn't present one now. He's extremely
10 remorseful for his actions. He's sought to rehabilitate
11 himself to the extent possible in prison notwithstanding this
12 severe language barrier which he suffers from. And as the
13 court is well aware, deportation would forever separate him
14 from his wife and two daughters who are all now U.S. citizens.
15 His other daughter is also a U.S. citizen. So for the record
16 to reflect that there appears no need for him to be deported as
17 it did with Ms. Miao, we would request that, because if he is
18 put in removal proceedings that may matter to the immigration
19 court.

20 Basically I'll rely otherwise on what we've already
21 submitted to avoid repeating myself. But I would ask the
22 court, since Mr. Xia did not have the opportunity previously to
23 address the court, that if the court would allow Mr. Xia to
24 speak briefly now.

25 THE COURT: Yes, of course.

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1 MS. MAHER: Also his daughter -- again this is -- the
2 court would allow her, his older daughter, to briefly address
3 the court as well.

4 THE COURT: I'll hear from him. He's entitled to
5 speak. And I'm happy to hear from him. And I'm happy to hear
6 briefly from his daughter as well.

7 MS. MAHER: Thank you, your Honor.

8 THE COURT: Mr. Xia, would you like to be heard today?

9 MS. MAHER: His English is very limited.

10 THE COURT: That's why he has an interpreter.

11 THE DEFENDANT: Yes, your Honor, I would like to say
12 something.

13 THE COURT: Go ahead.

14 THE DEFENDANT: Your Honor.

15 THE COURT: Wait for the interpreter to interpret,
16 please.

17 THE DEFENDANT: Your Honor, thank you for listening to
18 me.

19 THE DEPUTY CLERK: Mr. Chang, can you use the
20 microphone.

21 THE COURT: Thank you.

22 THE DEFENDANT: Thank you, your Honor. Thank you for
23 listening to me.

24 I also thank you for the opportunity to have my
25 sentence revised. I'm really sorry for the wrongdoings I

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1 committed in the past. I have never been resentful of the
2 sentence I received for all the time I'm in the prison for the
3 last ten months. I think it's the punishment that I deserve
4 for the wrongdoings that I have committed. I have also made my
5 family suffer and punished for my wrongdoings. My wife and my
6 two daughters are American citizens now. My wife is in poor
7 health. My two daughters are still in school. My youngest
8 sister is not grown up yet. I love them dearly. I am the only
9 economic support to my family. They are -- I am their
10 spiritual support. I plead to you, your Honor, would you
11 please consider this is my first crime committed. If you can
12 terminate my punishment to be now. If you can allow me to
13 continue to live with my own family. I would like to continue
14 to support them. I can see my daughters finish their school
15 and they can start their own careers. I would really plead you
16 to spare me the pain of being segregated from my family and can
17 never see them again. Me and my family will be grateful to
18 your kindness to us. Thank you.

19 THE COURT: I understand that one of Mr. Xia's
20 daughters would like to be heard.

21 MS. MAHER: Yes, your Honor, Deena. She goes by the
22 name of Deena.

23 THE COURT: Deena, is there something you'd like to
24 say today?

25 MS. XIAOMENG XIA: Yes.

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1 THE COURT: Why don't you have her speak at the
2 podium. We just want to be able to hear you and take your
3 time.

4 Go ahead.

5 MS. XIAOMENG XIA: Your Honor, my name is Xiaomeng
6 Xia. The defendant is my father. My father is a good, caring,
7 and responsible person. He always want to -- waiting to help
8 others. He works very hard to support our family. And he
9 tries his best to give my sister and I the opportunity to
10 obtain school without worrying about our family's financial
11 hardship. My mother is suffering from poor health. It is my
12 father who always take care of her.

13 THE COURT: Take your time. Take a deep breath.

14 MS. XIAOMENG XIA: Many times my father comes out in
15 the middle of the night to prepare medicines for my mother.
16 Almost every morning in the school year my father gets up very
17 early to drive my sister to the train station and he also picks
18 me up at the bus stop if I came home from school very late
19 because he's worried about our safety. My father is not only a
20 good father and a good husband, he also takes care of my
21 grandparents very well. The immigration officers already
22 noticed my father. I am so worried that my father will be
23 deported to China, that he will leave our family alone. Today
24 my mother misses him and I am here to beg your Honor, please,
25 give my father a chance to let him stay with us. My family is

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1 not a family anymore if we are without my father.

2 THE COURT: Thank you.

3 MS. XIAOMENG XIA: Thank you.

4 THE COURT: Thank you for speaking today. I'm sure it
5 meant a lot for your father to hear you speak about him so
6 movingly.

7 As you all know, I don't have control over immigration
8 and whether or not Mr. Xia is deported. I will say that I
9 don't have any reason to believe that he poses a danger to the
10 community in any way.

11 Is there any reason why sentence cannot be imposed at
12 this time?

13 MS. MERMELSTEIN: No, your Honor.

14 MS. MAHER: No, your Honor.

15 THE COURT: As I've stated, the guidelines range
16 applicable to this case is 18 to 24 months in prison. Under
17 the Supreme Court's decision in Booker and its progeny the
18 guidelines are only one factor that I must consider in
19 determining an appropriate sentence. I'm also required to
20 consider the other factors set forth in the provision of the
21 law that we've discussed, 18 United States Code Section
22 3553(a). I have done so.

23 I have already state my reasons previously for giving
24 Mr. Xia a sentence of one year and one day and I incorporate
25 all of those statements herein. Among those reasons were the

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1 seriousness of the offense with which I agree with the
2 government. The defendant's role, which while important, was
3 limited compared to a number of other defendants in this case
4 and his lack of criminal history.

5 One factor I did not considerate in the original
6 sentencing, however, is the impact that mandatory deportation
7 would have should Mr. Xia qualify as an aggravated felon under
8 the INA. I am considering that now, as I believe I'm permitted
9 to consider it, because I'm permitted to consider potential
10 immigration consequences under the Thavaraja case.

11 I've also considered the need to avoid unwarranted
12 sentencing disparities among defendants with similar records
13 who have been found guilty of similar conduct, and I have done
14 so, including Ms. Miao, who I do believe is more culpable, and
15 others that I have sentenced in this case. She, like Mr. Xia,
16 was facing mandatory deportation if she received a sentence of
17 a year or more.

18 Mr. Xia, please rise for the imposition of sentence.

19 It's the judgment of this court that you be sentenced
20 to a term of time served.

21 It's to be followed by a term of supervised release of
22 three years.

23 I do believe a term of supervised release is
24 appropriate here.

25 I am not imposing a fine because I am convinced that

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1 Mr. Xia cannot afford one.

2 I assume the \$100 special assessment which must be
3 imposed, I'm imposing, has already been paid; is that correct?

4 THE DEFENDANT: Yes.

5 THE COURT: So in any event that is part of the
6 sentence. It's already been paid.

7 I believe that this sentence is sufficient but not
8 greater than necessary to comply with the purposes of
9 sentencing set forth in the law.

10 The standard conditions of supervised release shall
11 apply.

12 I'm also imposing the following mandatory and special
13 conditions of supervised release.

14 In terms of the mandatory conditions, the defendant
15 shall not commit another federal, state, or local crime; shall
16 not illegally possess a controlled substance; shall not possess
17 a firearm or destructive device. The mandatory drug testing
18 condition is suspended based on the court's determination that
19 the defendant poses a low risk of future substance abuse. And
20 the defendant shall cooperate in the collection of DNA as
21 directed by the probation officer.

22 In addition, I'm imposing the following special
23 conditions of supervised release. The defendant shall obey the
24 immigration laws and comply with the directives of the
25 immigration authorities. He shall submit his person,

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1 residence, place of business, vehicle, or any other premises
2 under his control to a search on the basis that the probation
3 officer has a reasonable belief that contraband or evidence of
4 a violation of the conditions of release may be found. The
5 search must be conducted at a reasonable time and in a
6 reasonable manner. Failure to submit to a search may be
7 grounds for revocation. The defendant shall inform other
8 residents that the premises may be subject to search pursuant
9 to this condition.

10 He is to report to the nearest probation office within
11 72 hours of release from custody. And be supervised in the
12 district of his residence.

13 Finally -- you may be seated. I do want to address
14 forfeiture.

15 Ms. Maher, would you like to be heard on this.

16 MS. MAHER: Yes, your Honor. For the reasons I stated
17 previously with respect to fines, Mr. Xia is not financially in
18 a position to pay even a fine. Any forfeiture would be
19 impossible for him to pay. And his family is relying on him
20 for support so there would be no means for them to assist with
21 it. I would ask that under the circumstances any forfeiture
22 that he would be responsible for would be reduced to zero if
23 possible.

24 THE COURT: Well, I am going to impose -- thank you.
25 Would the government like to be heard with respect to

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1 forfeiture? I'll just tell you I'm inclined to follow the
2 method that I followed in previous sentences.

3 MS. MERMELSTEIN: We have no objection to that.

4 THE COURT: So I am going to impose a sentence that
5 includes forfeiture, but it's going to be less than the
6 forfeiture that was previously imposed.

7 Now, as I've said repeatedly at prior sentences, the
8 calculation of forfeiture amounts is not an exact science.
9 There was evidence at trial that the Bandrich firm filed
10 approximately 480 applications between 2010 and 2012 out of the
11 total 1800 filed by the conspiracy. From Special Agent
12 DeGraff's affidavit we know that 1,610 of those applications
13 were granted. Victor You and Meng Fei Yu testified that
14 substantially all of these applications were fraudulent. See
15 the trial transcript at 510, 1206. Taking Meng Fei Yu's
16 conservative estimate that 90 percent of the applications were
17 fraudulent, that means that approximately 1,449 fraudulent
18 applications were granted. Looking only at Bandrich, that
19 results in roughly 386 fraudulent grants.

20 Mr. Xia worked at Bandrich beginning in July of 2011,
21 for about half of the period from 2010 through 2012. That's
22 approximately 193 fraudulent applications were granted during
23 the period when Mr. Xia was working at the Bandrich firm.
24 Given his role as a paralegal at the Bandrich firm, I find all
25 of these applications were reasonably foreseeable to him. See

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1 the Contorinis case, 692 F.3d at 147.

2 As I did with previous sentences, I'm going to be
3 conservative, apply the 50 percent discount factor as suggested
4 by one of the government lawyers to the \$10,000 proceeds
5 figure. I acknowledge that this is a low estimate. But I'm
6 going to multiply the 193 applications by \$5,000 of proceeds
7 per application, yielding a forfeiture amount of \$965,000.

8 So I expect the government to submit an amended
9 preliminary order of forfeiture money judgment accordingly.

10 Does either counsel know of any legal reason why this
11 sentence cannot be imposed as stated?

12 MS. MERMELSTEIN: No, your Honor.

13 MS. MAHER: No, your Honor.

14 THE COURT: All right. This sentence as stated is
15 imposed. That's the sentence of this court.

16 Mr. Xia, you have a right to appeal your conviction of
17 sentence except to whatever extent you may have not already
18 waived that right. The notice of appeal must be filed within
19 14 days of the judgment of conviction. If you're not able to
20 pay the costs of an appeal, you must apply for leave to appeal
21 in forma pauperis. If you request, the clerk of court will
22 prepare and file a notice of appeal on your behalf.

23 I am going to sign the order today which indicates
24 that the court imposed a sentence of time served on the
25 defendant. And it is hereby ordered that he should be released

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1 from the custody of the United States marshal subject to any
2 warrants and detainers.

3 Is there a detainer?

4 MS. MERMELSTEIN: I don't believe so, your Honor.

5 THE COURT: So I have signed this and will be giving
6 these forms to the marshals.

7 Are there any other applications?

8 MS. MERMELSTEIN: No, your Honor.

9 MS. MAHER: No, your Honor.

10 THE COURT: Thank you. Good luck to you, Mr. Xia.

11 (Adjourned)
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